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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/758,987	01/16/2004	Jeffrey Douglas Lloyd	61761.US	7899

7590 04/15/2009  
LUEDEKA, NEELY & GRAHAM, P.C.  
P.O. Box 1871  
Knoxville, TN 37901

EXAMINER
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LEVY, NEIL S

ART UNIT	PAPER NUMBER
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1615

MAIL DATE	DELIVERY MODE
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04/15/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/758,987	<b>Applicant(s)</b> LLOYD ET AL.	
	<b>Examiner</b> NEIL LEVY	<b>Art Unit</b> 1615	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 02 February 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 15-17,20,24,26,40-44,47-52 and 54-68 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 15-17,20,24,26,40-44,47-52 and 54-68 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☒ Claim(s) 15-17,20,24,26,40-44,47-52 and 54-68 are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

#### ***Claim Rejections - 35 USC § 112***

Claims 15-17,20,24,26,40-44,47-52 & 54-68 stand rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. A METHOD FOR PREVENTING , termite damage; is different from the argued for prevention as a now claimed in the body of the claims, " - substantially reduce termite TUBE FORMATION --". Termite damage, irrespective of the tube formation reduction, could still occur- for instance if flying termites established a nest in the non-cementitious portions of the man-made structures. Thus, irrespective of examiner 's concordance with the understanding of the use of the term "prevention" in ;the arena of professional termite control, as explained by applicant, the term in the preamble leads one to expectation not necessarily fulfilled by reduction of termite tube formation, & should be replaced , for example with "\_reducing –termite damage –" .

Also note the glycols in claim 65 are not limited; they should be.

#### ***Claim Rejections - 35 USC § 103***

Claims 65-68 are rejected under 35 U.S.C. 103(a) as being unpatentable over RAMSEY US2003/0068485 in view of TIERNAN et al 5346699,BURNS et al 6370812 and BLOUNT 6423251.

Art Unit: 1615

RAMSEY shows highly toxic termiticides are undesirable and replaceable by fibrous particles (Summary, 0013), inclusive of cementitious coated building materials; foam boards. However, incomplete protection was shown [0031-0036].

TIERNAN shows Termites isoptera are controlled by borates (column 5, bottom) applied in a solution as foam spray (column 6, claim 2) to a concrete slab.

BURNS shows newer termiticides, less toxic, including disodium octaborate tetrahydrate (column 12, lines 4-26).

BLOUNT teaches glycol mix with borate to increase penetration (column 2, lines 53-60) to apply to building materials.

Ramsey shows the instant invention, but not specifically borates. Secondary references show the use of newer termiticides, borates of the instant invention, & glycol with borate to enhance penetration of concrete, whether at their production site, or equivalently, at their position as structural elements as treated by TIERNAN.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made, desiring to utilize termite control materials, to use one of those well known in the art, as exemplified by the primary references, with selection of the equivalent termiticides & materials to enhance effectiveness.

All the critical elements of the instant invention are disclosed. The amounts and proportions of each ingredient are result effective parameters chosen to obtain the

Art Unit: 1615

desired effects. It would be obvious to vary the form of each ingredient to optimize the effect desired, depending upon the particular pest species, reduction of toxicity to people, cost minimization, enhanced, and prolonged, or synergistic effects.

Applicant has not provided any objective evidence of criticality, non-obvious or unexpected results that the administration of the particular ingredients' or concentrations provides any greater or different level of prior art expectation as claimed, and the use of ingredient for the functionality for which they are known to be used is not a basis for patentability.

### ***Response to Arguments***

Applicant's arguments filed 2/20/09 have been fully considered but they are not persuasive. Although examiner is in accord with applicant's arguments of the use of the term "prevention", their remains littoral interpretation which examiner finds prevents that terminology of unambiguous interpretation. New claims are broader than amended, thus are seen as unpatentable in consideration of termiticide application to concrete, such as Tiernan's .

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

Art Unit: 1615

§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to NEIL LEVY whose telephone number is 571-272-0619. The examiner can normally be reached on Tuesday-Friday, 7 AM to 5:30 PM EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, MICHAEL WOODWARD can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1615

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/NEIL LEVY/  
Primary Examiner, Art Unit 1615

3/13/09